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No. 07-1551

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OLGA DE LEON, DAURYS BLADIMIL DE LEON, RAFAELA DE LEON, FRANKLIN ROA, JOSE GUERRERO MARTE, and CRISTIAN ENCARNACION,

Petitioners,

v.

SHIH WEI NAVIGATION COMPANY LTD and DONG LIEN MARITIME SA PANAMA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Dong Lien Maritime SA Panama, chartered in Panama, headquartered in Taipei, Taiwan, Republic of China, is a 100% subsidiary of Shih Wei Navigation Company, Ltd.

Shih Wei Navigation Company, Ltd., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Respondents, Shih Wei Navigation Company Ltd. and Dong Lien Maritime SA Panama, file this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners, Olga De Leon, *et al*, and would show as follows:

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Two Courts Below.

The Petitioners brought suit against Man Shipping, L.P. and Shih Wei Navigation Co., Ltd. in the United States District Court for the Southern District of Texas, Galveston Division, on October 28, 2005. Petitioners subsequently amended their complaint to include as defendants Man Shipping Limited, American Shipping and Chartering Corp., BHPB FT&L, BHP Billiton Transport & Logistics Pty. Ltd., Melbourne, Anchor Cross Shipbrokers Pty. Ltd., Dong Lien Maritime S.A. Panama, China Xiamen Corp. for International Tech-Eg-N Corp., and WELL PESCADORES S.A. BHPB Freight Party Ltd. then brought a Third-Party Complaint against Pegasus Denizcilik AS, the vessel's subcharterer. All of the defendants except the Respondents were voluntarily dismissed by Petitioners. The Respondents each filed a Motion to Dismiss for Lack of Personal Jurisdiction. The Petitioners filed a Motion for a New Trial on July 20, 2007, which was denied on August 3, 2007. Petitioners filed their Notice of Appeal to the United States Court of Appeals for the Fifth Circuit on August 28, 2007. The Fifth Circuit affirmed the District Court's order in a *per curiam* opinion filed on March 13, 2008. Petitioners now seek a Writ of Certiorari.

B. Statement of Facts.

1. The Incident Involving the Stowaways.

In March of 2003, five citizens of the Dominican Republic—William De Leon, Franklin De Leon, Franklin Roa, Jose Guerrero Marte, and Cristian Encarnacion (the "Stowaways")—covertly boarded the M/V WELL PESCADORES while it was on call in Santo Domingo, Dominican Republic.[1] The Stowaways secreted themselves in a hold of the ship in an apparent attempt to illegally enter the United States. While the vessel was in international waters *en route* to Houston, Texas, the Stowaways made themselves known to the crew. The crew insisted the Stowaways leave the vessel and put them overboard on rafts constructed out of dunnage.[2] Franklin Roa, Jose Guerrero Marte, and Cristian Encarnacion were picked up by a passing vessel approximately four hours later. Tragically, two of the Stowaways, William de Leon and Franklin de Leon, were apparently unable to swim and never made it to the raft.

The M/V WELL PESCADORES arrived in Houston on March 28, 2003. The Coast Guard placed a hold on the vessel pending an investigation by the Coast Guard and the FBI. The authorities ultimately turned the handling of the incident over to the Republic of Panama,

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1. At all times relevant to this case, the M/V WELLS PESCADORES was a Panamanian-flagged cargo ship that was operating under charter party agreement.

2. The actions of the chartered vessel's crew was in direct violation of the operating policy of the M/V WELLS PESCADORES.

the vessel's flag state. The WELL PESCADORES departed Houston for Panama on April 30, 2003.

2. The Control of the M/V WELL PESCADORES during the Relevant Time Period.

On the date of the incident, the M/V WELL PESCADORES was chartered to BHP Billiton Transport and Logistics Pty, Ltd., Melbourne under a Time Charter Party dated August 16, 2002 executed between BHPB and Dong Lien, as despondent owner. Man Shipping, a limited partnership existing under the laws of the Isle of Man, was the registered owner of the M/V WELL PESCADORES. Shih Wei served as the manager of the vessel. Dong Lien, a 100% owned subsidiary of Shih Wei, acted as its agent in executing the Time Charter Party as Owner. Shih Wei is incorporated under the laws of the Republic of China (Taiwan) and Dong Lien is a corporation incorporated under the laws of Panama. BHPB is a corporation incorporated under the laws of Australia. The Time Charter Party between BHPB and Dong Lien was negotiated exclusively in Taiwan and Melbourne, Australia, and executed in Melbourne, Australia.

Pegasus Shipping sub-chartered the M/V WELL PESCADORES from BHPB pursuant to a Voyage Time Charter Party dated January 6, 2003, and was the sub-charterer of the vessel at the time of the incident. Pegasus Shipping is a corporation incorporated under the laws of Turkey. The Charter Party between BHPB and Pegasus was executed in London, England.

The movements of the M/V WELL PESCADORES during the voyage in question, including the vessel's call at Houston to discharge cargo, were directed by its charterer, BHP Billiton Transport and Logistics Pty. Ltd., Melbourne, or its sub-charterer, Pegasus Denizcilik AS. Neither Shih Wei nor Dong Lien directed the M/V WELL PESCADORES to call at Houston.

3. The Defendants' Lack of Contacts with the United States

Shih Wei is a corporation incorporated under the laws of Taiwan (Republic of China). Dong Lien is a corporation incorporated under the laws of the Republic of Panama. Both Shih Wei and Dong Lien have their principal place of business at 16F, No. 167, Fusing N. Road, Song-Shan District, Taipei 105, Taiwan (Republic of China).

Neither of the Respondents have had any contacts with the United States other than isolated vessel calls to U.S. ports made at the direction of the vessels' charterers. They have no place of business or any office in the United States. They have no employees, agents, or servants located in the United States. The Respondents have never maintained a telephone number or a mailing address in the United States. The Respondents have no ownership relationship with or interest in any United States corporation or business entity, either as a parent, subsidiary, affiliate or otherwise. The Respondents have never owned, leased, or possessed any interest in property, real or personal, in the United States, been licensed or authorized to do business in any state of the United States, or earned

any income within the United States. The Respondents have never sold or produced any products and have never stored any goods or supplies in the United States.

Moreover, Respondents have never advertised or solicited any business within the United States. Respondents maintain no accounts or records in the United States. They maintain no bank accounts or banking relations in the United States and have not paid any taxes in the United States. Respondents have never initiated any legal proceedings in the United States. All of the Respondents' corporate representatives and witnesses and all of their corporate documents relative to this suit are located outside of the United States.

At the time of the voyage at issue, Shih Wei managed twenty-two vessels. Shih Wei-managed vessels made forty-three to forty-five calls to U.S. ports during the three-year period prior to the incident involving the Stowaways. This equates to each Shih Wei vessel calling on a U.S. port an average of 0.68 times per year, or roughly twice every three years. To the extent Shih Wei-managed vessels have called at U.S. ports, such calls were made at the commercial direction and control of the respective vessel's charterer or sub-charterer. Shih Wei has never purposely directed any vessel in its management fleet to the United States.

Dong Lien owned three vessels during the relevant period. To the extent that any of its vessels called in the United States, such calls were made at the commercial direction and control of the respective vessel's charterer or sub-charterer. Dong Lien has never purposely directed any vessel in its fleet to the United States.

REASONS FOR DENYING THE PETITION

There is no compelling reason for the Court to grant Petitioners' Request for Writ of Certiorari.

A. The Facts of the Case do not Present the Question Suggested by the Petitioner.

The only issue that may properly be brought before this Court is whether the Fifth Circuit Court of Appeals and the District Court correctly held that isolated vessel calls made to the United States at the direction of third party vessel charterers did not provided a basis for finding general personal jurisdiction over the Respondents, following *Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 785-787 (5th Cir. 1990)).

Petitioners did not contest the district court's conclusion that it could not exercise specific jurisdiction over Respondents on appeal. Hence the question of specific personal jurisdiction is not before the Court. Moreover, there was no basis for finding specific jurisdiction because the alleged misconduct of the crew occurred in international waters.

B. The Judgment Below is not Based on a Fundamental Misconception of the Law.

The Petitioners urge that the holdings below are based on an incorrect analysis based on statewide rather than nationwide contacts. In essence, Petitioners argue that the courts below did not consider nationwide personal jurisdiction under FED. R. CIV. P. 4(k)(2). This is not accurate. The Fifth Circuit and the trial court

properly concluded that no general personal jurisdiction exists over the Respondents based on their *nationwide* contacts, relying on *Asarco*. *Id.* The courts below held that there was no personal jurisdiction because: (1) the Respondents' sole contacts with the *United States* were forty-three to forty-five vessel calls by a fleet of twenty-two managed vessels during a three-year time period, made solely at the direction of the individual vessels' charterer; (2) vessel calls made at the direction of a vessel's charterer, not by the Respondents, cannot constitute purposeful availment for purposes of personal jurisdiction; and (3) even if the vessel calls were at the direction of the Respondents, the isolated and sporadic nature of the vessel calls are not substantial enough to satisfy due process requirements for the assertion of personal jurisdiction.

1. Requirements for the Exercise of General Jurisdiction

General personal jurisdiction cannot be exercised over a nonresident defendant unless there are "continuous, systematic, and substantial" contacts between the nonresident defendant and the forum state or the United States generally. *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 217 (5th Cir. 2000). The burden of persuasion remains with the plaintiff to make a *prima facie* showing of the Defendants' nationwide minimum contacts. *World Tanker Carriers Corp. v. M/V YA MAWLAYA*, 99 F.3d 717, 723-24 (5th Cir. 1996).

To make a *prima facie* showing of general personal jurisdiction, a plaintiff must produce evidence which affirmatively shows that the defendant has contacts with

the United States, unrelated to the litigation, that are sufficient to satisfy due process requirements. *Alpine View*, 205 F.3d at 217. Further, a non-resident defendant must purposely avail itself of the benefits of doing business in the United States and have fair warning that particular activities may subject it to U.S. jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). Therefore, a non-resident may not be subjected to jurisdiction in the United States based upon "random, fortuitous, or attenuated" contacts over which it had no control. *Id.* at 475.

2. No Personal Jurisdiction Exists over Respondents where Charterers Directed the U.S. Calls of their Vessels, Because Respondents did not Purposefully Avail Themselves of the Benefits and Protections of the Forum.

Petitioners base their argument for the exercise of general personal jurisdiction over the Respondents solely on the calls made to the United States by vessels owned and/or managed by the Respondents which were under charter to and under the directional control of third parties. There is no other basis for personal jurisdiction.

Petitioners' argument fails under the well-established Fifth Circuit precedent that vessel calls at U.S. ports made at the direction of a vessel's charterer are not sufficient to establish purposeful availment by the vessel's owner or manager for purposes of personal jurisdiction. *See, e.g., Asarco*, 912 F.2d at 786-87. Petitioners' suggestion that *Asarco* does not apply because it analyzed the sufficiency of minimum contacts

on merely a statewide basis as opposed to a national basis is inapposite, because the same standard—whether the exercise of jurisdiction comports with the limits of due process—applies in both situations. *See* FED. R. CIV. P. 12(b)(2); FED. R. CIV. P. 4(k)(2); *World Tanker Carriers Corp.*, 99 F.3d at 723-24. Moreover, the courts below based their holdings that there was no general personal jurisdiction after considering *all* the U.S. port calls made by Respondents' vessels.

Relying on *Asarco*, district courts within the Fifth Circuit have also continuously refused to exercise jurisdiction over the owners and managers of vessels under charter who did not direct or control their vessels' calls to U.S. ports. *See, e.g., Griner Co. v. M/V CONTI BLUE*, 1996 U.S. Dist. LEXIS 21561 *4-5 (S.D. Tex. 1996) (holding that "[u]nder Fifth Circuit law, it is clear that the owner of a vessel is not subject to personal jurisdiction merely because his vessel was used to transport goods into the forum state," and thus refusing to exercise personal jurisdiction over vessel owner).[3]

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3. *See also Saudi v. S/T MARINE ATLANTIC*, 159 F. Supp. 2d 469, 482 (S.D. Tex. 2000) (noting that "where the non-resident defendant does not direct and control the destination of the vessel, there is no personal jurisdiction over that defendant because that defendant cannot purposely avail itself of the benefits and protections of the forum port"); *Sibrian v. Chapel Navigation, Ltd.*, 1997 U.S. Dist. LEXIS 19616 *4 (E.D. La. 1997) (holding that "because the [vessel] owner did not choose the ports, the owner cannot be held to have availed itself of the benefits and protections of doing business in Louisiana by virtue of the contacts"); *Carter v. LaGloria Shipping*, 1997 U.S. Dist. LEXIS 11047 *8-9 (E.D. La. 1997) (noting that all vessel calls

(Cont'd)

C. The Decisions of the United States Court of Appeals for the Fifth Circuit are in Accord with Decisions Rendered by the Other Circuit Courts.

Courts outside the Fifth Circuit have consistently followed and been in accord with the Fifth Circuits holding in *Asarco*. There are no conflicts among the Circuits. For example, the District Court for the Southern District of New York held that all of a vessel owner's U.S. contacts in the aggregate did not amount to "continuous and systematic general business contacts" so as to provide a basis for general jurisdiction where the charterer, not the owner, directed the movement of the vessel. *In Re: Complaint of KRETA SHIPPING, S.A* 1998 U.S. Dist. LEXIS 5081, *21 (S.D.N.Y. 1998) (*relying on Asarco, Inc.*, 912 F.2d at 787).[4]

In *Conner v. Bouchard Transp. Co. Inc.*, the District Court for the Eastern District of Pennsylvania refused to exercise jurisdiction over a vessel owner/manager where

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(Cont'd)
were made at direction of charterer, not Defendants); *In re Gemini Navigation*, 1996 U.S. Dist. LEXIS 20860 *11 (S.D. Tex. 1996) (noting that "the mere fact that a vessel makes numerous port calls in a particular state does not, in itself, demonstrate contacts sufficient for exercising general personal jurisdiction").

4. *See also Canadian Group Underwriters Ins. Co. v. M/V "Arctic Trader,"* 1998 U.S. Dist. LEXIS 16293 (S.D.N.Y. 1998) (relying in part on *Asarco* in finding that even when the charter party agreement limits the possible destinations of the charterer, it is still the charterer and not the owner who finally chooses the destination and therefore the court cannot assert personal jurisdiction over the owner).

the defendant's only contacts were 100 calls to the Port of Philadelphia at the direction of the charterers, by thirty-six vessels, during a five-year period. 1993 U.S. Dist. LEXIS 13786 *4-10 (E.D. Pa. 1993) (relying on *Asarco* in holding that when the charterer and not the owner determines where the vessels will sail that the contact can best be described as "'haphazard and fortuitous,' rather than systematic and continuous").

The Northern District of Illinois came to a similar conclusion in *Sompo v. M/V COMMANDER*, where it refused to exercise personal jurisdiction over the vessel owner where the charterer directed the cargo to the United States. *Sompo Japan Ins. Co. of Am.*, 329 F. Supp. 2d 971, 971-73 (N.D. Ill. 2004) (relying in part on *Asarco* in holding that there was no purposeful availment where the owner did not direct the movement of the vessel).

There are numerous other cases throughout the circuits where the courts came to the same conclusion as *Asarco* without specifically referring to and/or relying on that opinion.[5]

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5. *See Francosteel Corp. v. M/V CHARM*, 19 F.3d 624, 628 (11th Cir. 1994) (refusing to exercise personal jurisdiction over vessel owner and manager, and noting that sub-charterer, not vessel interest defendants, controlled the destination of the vessel); *Nicolaisen v. Toei Shipping Co.*, 722 F. Supp. 1162, 1165 (D.N.J. 1989) (refusing to exercise personal jurisdiction over vessel owner based on seventeen port calls made by one vessel to New Jersey during a four-year period, and characterizing these contacts as "haphazard and fortuitous rather than continuous and systematic"); *Porina v. Marward Shipping Co.*, 2006 U.S. Dist. LEXIS 60535 *17-22 (S.D.N.Y. 2006) (the court declined to find personal jurisdiction where charterer not vessel owner directed movement of vessel even though one vessel visited forum state seventeen times in two-year period).

D. There is no Conflict with the Decisions of This Court.

The Petitioners point to no decision of this Court with which the holding below conflicts. The Fifth Circuit in its decision below relied exclusively on *Ascarco, Inc. v. Glenara, Ltd, supra*, to hold that the Respondents "lack the requisite 'continuous and systematic' contact with the forum to support the exercise of general personal jurisdiction." (Slip Op. at 8). There is nothing to suggest that the analysis employed in *Ascarco* is in conflict with any decision of this Court. As in this case, the only contacts the defendant in *Ascarco* had with the forum were vessel calls made at the direction of the charterers who were third parties to the litigation. *Asarco*, 912 F.2d at 787. Consistent with the decisions of this Court, the Fifth Circuit held that the defendant "cannot be held to have availed itself of the benefits and protections of doing business in [the forum state] by virtue of its sporadic operational management of vessels set to [the forum state] by others." *Id.* This specific application of the general guidance found in the decisions of this Court for due process inquiry to be carried out to determine if the exercise of personal jurisdiction is appropriate is consistent with those decisions and has been utilized in many situations without controversy.

E. No Constitutional Question is Presented.

The constitutionality of statute of the United States or of any State is implicated by the decisions below.

CONCLUSION

The Petition before the Court does not present special and important matters for certiorari. The decisions below were correct, consistent to other federal appellate circuit courts, and are consistent with the prior decisions of this Court. Finally, no constitutional questions or matters of grave social concern are presented. Accordingly, Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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